Honorable Judge John C. Coughenour

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

CHONG and MARILYN YIM, KELLY LYLES, EILEEN, LLC, and RENTAL HOUSING ASSOCIATION OF WASHINGTON, Plaintiffs, v. THE CITY OF SEATTLE, a Washington Municipal corporation, Defendant.	Civil Action No. 2:18-cv-00736-JCC **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** **Noted on Motion Calendar January 11, 2019** **ORAL ARGUMENT REQUESTED**

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INTRODUCTION

The Fair Chance Housing Ordinance bans an important conversation between landlord and prospective tenant that begins like this: Have you ever committed a crime? By federal law, that question must be just the beginning of a conversation about individual circumstances. But Seattle bans *all* inquiries into criminal history when landlords are assessing applicants for rental housing. Regardless of how serious or recent the prior offense may be, Seattle landlords must now operate in the dark regarding rental applicants' crimes. This gag rule impairs landlords' ability to protect themselves, their property, and their other tenants.

By hobbling landlords' ability to adequately assess candidates and selectively restricting access to otherwise public information, this gag rule on criminal background checks violates the freedom of speech. Additionally, landlords have a fundamental right to select their tenants. *See Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 363-65 (2000) (landowners' right to choose the person they sell property to is a "fundamental attribute of property ownership"). The gag rule, by denying landlords the chance to inquire about or deny an applicant because of criminal history, restricts this property right without due process of law.

STATEMENT OF FACTS

The gag rule on criminal background checks

The City passed the Fair Chance Housing Ordinance in August 2017 to "address barriers to housing faced by people with criminal records." SF ¶ 33; SR 592. [1] The Ordinance's gag rule declares it an "unfair practice for any person to . . . [r]equire disclosure, inquire about, or take an adverse action against a prospective occupant, tenant, or member of their household based on any arrest record, conviction record, or criminal history." SMC § 14.09.025(A)(2). "Adverse action" includes, among other things, denying tenancy, evicting an occupant, terminating a lease, and "[t]hreatening, penalizing, retaliating, or otherwise discriminating against any person for any reason prohibited" by the Ordinance. *Id.* § 14.09.010.

[1] The parties have agreed to stipulated facts and a stipulated record pursuant to the Court's Minute Order on July 20, 2018. This brief cites to the Stipulated Facts by paragraph number and the designation "SF." Cites to the Stipulated Record are designated by "SR" with a reference to the corresponding bates number.

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The gag rule applies both to landlords and to any organizations or individuals that provide professional screening services. The Ordinance's prohibition on inquiries about criminal history of housing applicants applies to any "person," defined as "one or more individuals, partnerships, organizations, trade or professional associations, corporations, legal representatives . . . [or] any owner, lessee, proprietor, manager, agent, or employee, whether one or more natural persons, and any political or civil subdivision or agency or instrumentality of the City." *Id.* § 14.09.010.

The gag rule carves out a qualified exception for adults on a sex offender registry. *See id.* § 14.09.025(A)(3). A landlord can deny tenancy based on an adult applicant's registry information if the landlord can demonstrate a "legitimate business reason" for doing so. *See id.* A legitimate business reason for denial must be "necessary to achieve a substantial, legitimate, nondiscriminatory interest." *Id.* § 14.09.010. The Ordinance does not offer a mechanism for obtaining a ruling from the Office of Civil Rights on whether a landlord has a legitimate business reason for denying an applicant based on a sex offense.

The gag rule also exempts federally assisted housing. SMC § 14.09.115(B). Landlords of federally assisted housing can perform criminal background checks and deny tenancy based on criminal history "including but not limited to when the household is subject to a lifetime sex offender registration requirement under a state sex offender registration program and/or convicted of manufacture or production of methamphetamine on the premises of federally assisted housing." *Id.* The Seattle Housing Authority, a public corporation, administers federally assisted housing in the City. Seattle Housing Authority, About Us, *available at* https://www.seattlehousing.org/about-us (last visited Sept. 26, 2018).

The Ordinance's recitals claim that a criminal history does not affect tenancy. *See* SR 589. The City bases this assertion on research contained in the legislative file. *See* SR 495-521. That research, however, only studied residents living in supportive housing programs. SR 511-12. Because of this narrow context, the research itself warned against applying its data to the broader housing market. *See id.* 511 n.116.

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No other jurisdiction has passed a gag rule like Seattle's. In fact, both state and federal law recognize a landlord's right to perform criminal background checks. State law requires that landlords who deny someone because of criminal history notify the tenant in writing. *See* RCW 59.18.257(1)(c). And the Fair Credit Reporting Act exempts criminal records and tenant screening databases from security freezes for protected consumers. RCW 19.182.230; *see also* 16 C.F.R. pt. 600, § 4(E) Public Record Information (2010) (criminal background is "information bearing on the consumer's 'personal characteristics'" for purposes of the Fair Credit Reporting Act).

Along these lines, the U.S. Department of Housing and Urban Development (HUD) recommends that public housing authorities screen for any "history of criminal activity involving crimes of physical violence to persons or property and other criminal acts which would adversely affect the health, safety or welfare of other tenants." 24 C.F.R. § 960.203(c) (2010). And HUD mandates criminal history checks for sex offender registry and certain other offenses. 24 C.F.R. § 982.553(a)(1)(ii)(C), (2)(i).

All 50 states make their criminal background databases accessible to the public and allow criminal background checks for housing. SR 327-28. A robust business has grown around providing such background services. *See id.* 551. Research indicates that four out of five landlords regularly conduct background checks for rental applicants. *See .id.* 450. The City has offered no evidence that landlords in Seattle frequently reject applicants solely because of a criminal history.

Plaintiffs

Chong and MariLyn Yim, Kelly Lyles, and Eileen, LLC, are plaintiff landlords who own and manage small rental properties in Seattle. *See* ¶¶ SF 2-8. Plaintiff Rental Housing Association of Washington (RHA) is a membership organization that provides screening services to its members. *See Id.* ¶¶ 9-10.

Chong and MariLyn Yim own a duplex and a triplex in Seattle. *Id.* ¶ 2. They and their three children live in one of the triplex units. *Id.* The Yims rent out the other two units in the triplex and both units in the duplex. *Id.* The Yims share a yard with their renters in the triplex, and the Yim

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children are occasionally at home alone when the renters are home. *Id.* A single woman occupies one of the two rented units in the triplex, and a couple occupies the other. *Id.* ¶ 3

Three roommates live in one of the Yims' duplex units, and two roommates occupy the other duplex unit. *Id.* Occasionally, the duplex tenants need to find a new roommate. *Id.* Some of the new roommates were strangers to the tenants before moving in. *Id.*

Prior to the gag rule, the Yims regularly requested criminal background screening of rental applicants, including roommate applicants. *Id.* The Yims are willing to rent to individuals with a criminal history depending on the number of convictions, the severity of the offenses, and other factors they deem relevant to the safety of the Yims, their children, and their other tenants *Id.* ¶ 4.

Kelly Lyles is a single woman who, in addition to her own Seattle residence, owns and rents a house in the City. *Id.* ¶ 5. Ms. Lyles understands the needs of individuals recovering from addiction and would consider an applicant who did not otherwise satisfy her screening criteria if the applicant was part of a recovery program. *Id.*

Ms. Lyles is a local artist who relies on her rental income to afford living in Seattle. *Id.* ¶ 6. She cannot afford to miss a month's rental payment and cannot afford an unlawful detainer action to evict a tenant who fails to timely pay. *Id.* As a single woman who frequently interacts with her tenants, she considers personal safety when selecting them. *Id.* ¶ 7. She currently rents to a Ph.D. student. *Id.* With Ms. Lyles's permission, that tenant has subleased the basement to a single, divorced woman. *Id.*

Scott Davis and his wife own and manage Eileen, LLC, through which they operate a seven-unit residential complex in the Greenlake area of Seattle. *Id.* ¶ 8. The Davises would consider applicants with a criminal history based on the circumstances of the crime and the safety needs of the other tenants. *Id.*

RHA is a nonprofit membership organization serving landlords throughout Washington. *Id.* ¶ 9. The majority of RHA's 5,300 members own and rent residential properties in Seattle. *Id.* Most rent out single-family homes, often on a relatively short-term basis due to the landlord's work, personal, or financial needs. *Id.*

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Among other services, RHA screens rental applicants. *Id.* ¶ 10. Landlords must become RHA members and complete a certification process to use this service. *Id.* ¶¶ 10-11. Additionally, tenants can purchase a reusable screening report from RHA. *Id.* ¶ 10. The criminal history section of RHA's screening reports displays the relevant jurisdiction of any given offense, a short description of the offense, the disposition and disposition date, sentence length, probation length, and other minor details. SF ¶ 15; *see* SR 1-6.

After passage of the Fair Chance Housing Ordinance, RHA created Seattle-specific screening packages that omit criminal background. *See* SF ¶ 18; SR 7-13. RHA also created a new model rental application for Seattle landlord members, which contains mandatory disclosures and omits questions about criminal history. *See* ¶ 18; *see* SR 15-16.

Because of the Fair Chance Housing Ordinance, the plaintiff landlords must operate in the dark with respect to rental applicants' criminal history. As a result, they cannot fulfill their legal obligation to protect their tenants against crimes committed by other tenants. *See Griffin v. West RS, Inc.*, 97 Wn. App. 557, 570 (1999) ("Here, we recognize that a residential landlord has a duty to protect its tenant against foreseeable criminal acts of third parties."), *rev'd on other grounds by* 143 Wn.2d 81 (2001). Chong and MariLyn Yim can no longer assure their tenants searching for new roommates that an applicant does not have a violent history. Nor can the Yims check whether rental applicants who would live in the same building with them and their children have a checkered past. Kelly Lyles can no longer ensure her own safety and comfort as a single woman by determining whether rental applicants have committed serious crimes. RHA, in turn, can no longer offer criminal background screening to its Seattle members.

ARGUMENT

The Fair Chance Housing Ordinance burdens speech by restricting access to public information and deprives landlords of a property interest by prohibiting them from considering criminal history. It must therefore face means-end scrutiny under both the free speech and due process guarantees of the federal and state constitutions.[2] The Ordinance fails to adopt less-

[2] The Washington Supreme Court has held that the state free speech guarantee is more robust than its federal counterpart, but the state constitution's heightened protection must be assessed in each specific context. *Ino Ino, Inc.*

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restrictive alternatives, suffers from an underinclusive scope, and makes arbitrary distinctions that buckle under even mild forms of constitutional scrutiny.

I. Seattle's gag rule violates the First Amendment by prohibiting a specific group from inquiring about, accessing, and sharing otherwise publicly available information

The First Amendment applies to restrictions on access to public information. "[I]t is a limited set of cases indeed where, despite the accessibility of the public to certain information, a meaningful public interest is served by restricting its further release by other entities." *Florida Star v. B.J.F.*, 491 U.S. 524, 535 (1989). A law raises even greater concerns when it restricts access to a specific group of speakers who wish to use the information for a particular purpose. *See Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 567 (2011) ("Both on its face and in its practical operation, Vermont's law imposes a burden based on the content of speech and the identity of the speaker."). Because the Fair Chance Housing Ordinance restricts access to otherwise public information based on a speaker's identity and purpose, it must face strict scrutiny. The law fails that test because it is suspiciously underinclusive and is not the least-restrictive means of achieving the government's interest.

A. The First Amendment applies to the gag rule because the rule prohibits inquiries about publicly available criminal history for the purpose of evaluating potential tenants

The First Amendment protects the right to both share and receive information. An individual's prerogative to seek and access information is an "inherent corollary of the rights of free speech." *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982). This right to receive has two faces: "First, the right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them." *Id.* at 867. And further, "the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of

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v. City of Bellevue, 132 Wn.2d 103, 115 (1997). The Washington Supreme Court has yet to hold that the state constitution is more protective than the federal Constitution when it comes to access restrictions, so this brief relies on the federal analysis for both free speech claims. *See Bering v. SHARE*, 106 Wn.2d 212, 234 (1986) ("Although the free speech clauses of the state and federal constitutions are different in wording and effect, our confidence in the general federal analysis prompts our adoption of this methodology for application in state constitutional cases.").

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speech." *Id.* In short, when someone opens his mouth, "the protection afforded is to the communication, to its source and to its recipients both." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976).

The scope of this right of access depends on who controls the information. The government, for instance, has some authority to withhold information solely within its control. *See Houchins v. KQED, Inc.*, 438 U.S. 1, 9 (1978) ("This Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control."). But the government cannot selectively restrict access to information already publicly available, or information controlled by others. *See Sorrell*, 564 U.S. at 568 ("Vermont has imposed a restriction on access to information in private hands."); *Smith v. Daily Mail*, 443 U.S. 97, 103 (1979) ("We held that once the truthful information was 'publicly revealed' or 'in the public domain' the court could not constitutionally restrain its dissemination."); *Legi-tech, Inc. v. Keiper*, 766 F.2d 728, 734 (2d Cir. 1985) ("Rather than seeking special access in addition to that enjoyed by the public, Legi-Tech seeks access equal to that offered to the public.").

Hence, a state could perhaps withhold its own arrestee information entirely without violating the First Amendment, but "[a] different, and more difficult, question is presented when the State makes information generally available, but denies access to a small disfavored class." *Los Angeles Police Dep't v. United Reporting Pub. Corp.*, 528 U.S. 32, 45 (1999) (Stevens, J., dissenting). A burden on speech thus arises when "a restriction upon access . . . *allows* access to the press . . . but at the same time *denies* access to persons who wish to use the information for certain speech purposes." *Sorrell*, 564 U.S. at 569 (quoting *United Reporting*, 528 U.S. at 41-42 (Scalia, J., concurring)). For example, in *Sorrell v. IMS Health*, the Supreme Court addressed a Vermont law that restricted the sale, disclosure, and use of certain pharmacy records to marketers, while allowing such sale or disclosure to others, such as academic researchers. *Sorrell*, 564 U.S. at 557. The Court held that denying a specific group access to otherwise accessible information because of how they planned to use the information violated the First Amendment. *Id.* at 564; *see*

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also Legi-Tech, 766 F.2d at 734 (First Amendment issue arose because state law "denies [plaintiff] the very access to information offered to the general public.")

A restricted access claim can be brought by both those who share and those who receive information because the constitutional protection applies "to the communication, to its source and to its recipients both." *Virginia State Bd. of Pharmacy*, 425 U.S. at 756. Claimants therefore can still seek relief if they wish to be recipients of restricted information, even when they "do not themselves possess information whose disclosure has been curtailed." *Sorrell*, 564 U.S. at 568. It suffices that the First Amendment claimant seeks access to information that has been selectively restricted.

Seattle's gag rule implicates the First Amendment by restricting access to information that Seattle does not control—and which is otherwise publicly available—if the inquirer plans to use that information for a purpose that the City disapproves. The gag rule forbids "any person" from "inquir[ing] about" the "arrest record, conviction record, or criminal history" of "a prospective occupant, tenant, or a member of their household." SMC § 14.09.025(A)(2). The Ordinance defines "person" broadly enough to encompass screening services and other non-landlord parties. *See id.* § 14.09.010.

All 50 states provide publicly available criminal background information for a wide range of purposes, including vetting people for housing. *See* SR 327-28. The Fair Chance Housing Ordinance, by restricting access to this publicly available information, implicates First Amendment interests. Landlords cannot inquire after this truthful, non-misleading information in order to protect their own interests and the interests of their tenants. RHA can no longer inquire after this information in order to provide screening services and engage in its own protected speech in the form of background reports; the gag rule thus curtails RHA's "right to receive ideas [as] a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech." *Pico*, 457 U.S. at 867.

The gag rule resembles Vermont's pharmaceutical marketing law in *Sorrell*. As in *Sorrell*, the government has restricted access to publicly available information if the inquirer intends to use

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it for a purpose that the government disapproves—to market pharmaceutical products in *Sorrell* or to vet applicants for residential housing here. The Ordinance thus must satisfy First Amendment scrutiny because it "denies access to persons who wish to use the information for certain speech purposes." *Sorrell*, 564 U.S. at 569.

B. The gag rule must face strict scrutiny as a content-based and speaker-based speech regulation

Content-based speech regulations are "presumptively unconstitutional" and must survive strict scrutiny. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015). A law is content-based if it targets speech based on the substance of the communication. *Id.* at 2226. Laws are even more suspect if they "disfavor specific speakers." *Sorrell*, 564 U.S. at 564. In *Sorrell v. IMS Health*, such a "speaker-based" regulation was subject to strict scrutiny because Vermont prohibited disclosure of certain prescription data for marketing purposes but allowed disclosure for other purposes. *Id.* at 564-65.

The gag rule is content-based because it restricts access to information based on the information's content—any criminal history, encompassing arrest, conviction, and disposition records. SMC § 14.09.025(A)(2). Likewise, it imposes a speaker-based burden because, like in *Sorrell*, it prohibits access to information based on the speaker's purpose in seeking it—namely, for residential housing. The gag rule must therefore satisfy strict scrutiny.

The gag rule is not a commercial speech restriction subject to intermediate scrutiny; this weaker scrutiny only applies to "speech which does no more than propose a commercial transaction." *Bolger v. Youngs Drug Products Co.*, 463 U.S. 60, 66 (1983) (quotation marks omitted). A speaker's economic motive does not by itself render speech commercial. *Id.* at 66-67. While screening companies do offer information for a price, the information's content is non-commercial. Likewise, while a landlord inquires after information to assist her in managing her property, that information does not "propose a commercial transaction."

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C. The gag rule is not narrowly tailored to achieve the City's interests

Under strict scrutiny, the government carries the burden of demonstrating that the speech regulation furthers a compelling interest and is narrowly tailored to fulfilling that interest. *See Reed*, 135 S. Ct. at 2227. Even assuming that the Fair Chance Housing Ordinance furthers a compelling interest, it still fails strict scrutiny under narrow tailoring.

1. The gag rule is underinclusive

The gag rule is underinclusive because it exempts federally assisted housing—including housing managed by the City. SMC § 14.09.115(B). This self-serving exemption severely undermines narrow tailoring.

A law's underinclusive scope bears on narrow tailoring because "underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 802 (2011). Underinclusiveness also demonstrates that "a law does not actually advance a compelling interest." *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1668 (2015).

A law is underinclusive if it does not extend to equally harmful activity "when judged against [the law's] asserted justification." *Brown*, 564 U.S. at 802. Underinclusiveness does not require a law to "address all aspects of a problem in one fell swoop;" instead, a law is underinclusive if it "regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest *in a comparable way*." *Williams-Yulee*, 135 S. Ct. at 1670.

In *Florida Star v. B.J.F.*, the Supreme Court applied this analysis to a state law prohibiting "mass media" from disclosing the names of rape victims even though the state revealed such names to the public. *Florida Star*, 491 U.S. at 526-27. The Court held that the government "must demonstrate its commitment to advancing this interest by applying its prohibition evenhandedly" to small-time publishers and media giants alike. *Id.* at 540. When it comes to the First Amendment, a "ban on disclosures . . . simply cannot be defended on the ground that partial prohibitions may effect partial relief." *Id.*

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The gag rule is underinclusive because it exempts federally assisted housing. SMC § 14.09.115(B). The stipulated record establishes that barriers to both private and public housing affect housing stability for those with a criminal history. SR 442. Yet the Fair Chance Housing Ordinance frees a large category of housing from the gag rule. SMC § 14.09.115(B).

HUD subsidizes rent for eligible tenants through federally assisted housing programs managed by local public housing authorities. 24 C.F.R. § 982.1(a)(1). Such assistance can be "project-based" or "tenant-based." *Id.* § 982.1(b). With project-based assistance, families who live in specific public housing developments receive rental subsidies. *Id.* § 982.1(b)(1). With tenant-based assistance, a tenant leases a unit in the private market, and the housing authority contracts with the landlord to subsidize the tenant's rent. *Id.* § 982.1(b)(2).

Seattle Housing Authority is the qualified public housing authority that manages Seattle's project-based and tenant-based federally assisted housing. *See* Seattle Housing Authority, About Us, www.seattlehousing.org. Seattle Housing Authority also offers a variety of supportive services for individuals living in federally assisted housing, including job, education, and health care help. *See id.*, Supportive Services, https://www.seattlehousing.org/supportive-services.

Under the gag rule, an applicant in Seattle's private housing market who seeks to receive federal housing assistance can be subjected to a criminal background check. *See* SMC § 14.09.115(B). About 10,000 tenants receive such tenant-based assistance. *See* Seattle Housing Authority, https://www.seattlehousing.org/about-us. Additionally, any project-based federally assisted housing managed by the Seattle Housing Authority is exempt from the gag rule, accounting for 8,000 apartments and single-family homes. Seattle Housing Authority, https://www.seattlehousing.org/about-us.

The special dispensation for federally assisted housing is particularly ironic because the City's own legislative record indicates that individuals with a criminal history are less likely to re-offend when placed in "supportive housing" programs that provide at-risk populations with a suite of social services and rent subsidies. *See* SR 511 n.116, 512. Yet the City has given the very institution that provides these services a special dispensation to take "adverse action" against the

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tenants based on their criminal histories. Like the law in *Florida Star* that only banned disclosure of victim's names by certain forms of media, Seattle's selective ban on disclosures of criminal history "simply cannot be defended on the ground that partial prohibitions may effect partial relief." *Florida Star*, 491 U.S. at 540.

In fact, the underinclusiveness here is more suspect than in *Florida Star*. In *Florida Star*, privacy interests threatened by disclosure of victims' names were arguably more imperiled by disclosure through mass media than through smaller outfits. *See id.* Here, by contrast, the City allows the housing most likely to help the formerly incarcerated to engage in background checks while imposing the gag rule on housing least likely to further the City's interests. This would be like banning only small publishers from disclosing victims' names while allow media giants to disclose such names without restriction. The gag rule therefore "regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest *in a comparable way*." *Williams-Yulee*, 135 S. Ct. at 1670. This underinclusive and self-serving approach to a social problem seriously undermines the City's justification for the gag rule.

The City cannot defend the exemption on the grounds that federal law requires the Seattle Housing Authority to engage in criminal background checks. Federal regulations impose certain conditions on a local housing authority's access to federal funds. Among other things, HUD requires public housing authorities to deny assistance to tenants who have ever been convicted "for manufacture or production of methamphetamine on the premises of federally assisted housing" or are "subject to a lifetime registration requirement under a State sex offender registration program." 24 C.F.R. § 982.553(a)(1)(ii)(C), (2)(i). Public housing authorities must perform criminal history background checks necessary to determine whether a tenant has committed one of these specific offenses. *Id.* § 982.553(a)(2)(i). On the other hand, the federal regulations make clear that a public housing authority is allowed to consider other types of criminal history but is not required to do so. *See id.* § 982.553(a)(2)(ii).

The exemption for federally assisted housing, however, extends beyond just sex offender registration and the narrow range of drug-related crimes prohibited by HUD. The carve-out applies

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broadly to any adverse action taken against a tenant by landlords of federally assisted housing for reasons "*including but not limited to* . . . a lifetime sex offender registration . . ." or a conviction for "manufacture or production of methamphetamine on the premises of federally assisted housing." SMC § 14.09.115(B) (emphasis added). The exemption thus expressly allows criminal background checks that are not required by federal regulations.

Even if the exemption was required by federal law, the underinclusive scope of the gag rule still would not pass muster. After all, the City could still "apply[] its prohibition evenhandedly" by allowing all landlords the same exemption as federally assisted housing. *Florida Star*, 491 U.S. at 540. The City, for instance, has offered no rationale for requiring a "legitimate business reason" if a private landlord wishes to deny tenancy to a sex offender while requiring no such showing from the Seattle Housing Authority. The City can apply its law equally to both the private and public housing markets without violating federal law, yet it declined to do so. The Ordinance is thus fatally underinclusive.

2. The gag rule is not the least restrictive means to achieve the City's interest

The City claims an interest in achieving stability for individuals with a criminal history, SR 554, but the gag rule is not the least restrictive means of achieving that interest. The City has many tools available to encourage landlords to rent to individuals with a criminal history or otherwise regulate the housing market to assist these individuals in the search for housing without contravening speech rights.

Narrow tailoring requires the government to adopt the means that is least restrictive of speech. *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). Careful analysis of alternatives to a speech regulation is vital to "ensure that speech is restricted no further than necessary to achieve the goal, for it is important to ensure that legitimate speech is not chilled or punished." *Id.*

Less restrictive means do not need to be just as effective as the speech regulation. For example, in *Schneider v. Town of Irvington*, various municipalities had banned the distribution of pamphlets in public areas to reduce litter. 308 U.S. 147, 154-57 (1939). The Court held, however, that the law could instead target conduct rather than speech by outlawing littering. *Id.* at 162. This

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alternative could have meant more littering overall, but the Court held that the alternative was viable even if it was "less efficient and convenient" than the speech regulation. *Id.* at 165; *see also Ashcroft v. ACLU*, 542 U.S. at 668 (less-restrictive alternatives do not need to offer a "perfect solution"). Importantly, the government shoulders the burden of demonstrating that less-restrictive alternatives would be ineffective. *Ashcroft v. ACLU*, 542 U.S. at 665 ("[T]he burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute."); *see also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 826 (2000) (invalidating a speech restriction where the "record is silent as to the comparative effectiveness of the two alternatives").

In fact, an alternative need not be a mandate at all to be a valid less-restrictive alternative; incentives work as well. For instance, in *Ashcroft v. ACLU*, the Supreme Court held that Congress could create incentives for parents to purchase and use internet filters as a valid alternative to restricting internet speech. 542 U.S. at 669.

Similarly, legitimate alternatives need not be speech-based; regulations that target conduct but achieve the same broader objective are also open to consideration. Hence, in *Schneider*, the Court looked to laws against littering instead of a handbill restriction, 308 U.S. at 162, and internet filtering software was a valid, less-restrictive means for dealing with censorship of internet speech in *Ashcroft*. 542 U.S. at 667. In addition to roads not taken, existing laws can be valid alternatives to a speech restriction. *See Italian Colors Restaurant v. Becerra*, 878 F.3d 1165, 1178 (9th Cir. 2018) (holding that California had "other, more narrowly tailored means of preventing consumer deception," including enforcement of existing laws against unfair business practices).

The City could have adopted a host of strategies to help people with a criminal history obtain housing. In fact, the City's own Clerk's File contains an article that makes one such suggestion: reform Washington tort law to better protect landlords from liability for crimes committed by their tenants. *See* SR 516-21.

Also, federal housing regulations utilize less-restrictive alternatives for federally assisted housing that the City could adopt. Federal law allows a public housing authority to assist someone

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previously denied because of criminal history "if the household member submitted a certification that she or he is not currently engaged in and has not engaged in such criminal activity during the specified period and provided supporting information from such sources as a probation officer, a landlord, neighbors, social service agency workers and criminal records." 24 C.F.R. § 982.553(a)(2)(ii)(C)(1). The City could establish a certification program that relies on similar indicia of good character and require landlords to consider the certification and turn down a certified individual only with good cause.

Additionally, the City can indemnify or insure landlords willing to rent to individuals with a criminal history; public insurance could help cover property damage, liability, and other risks that a landlord may take when renting to someone with a criminal history. Such non-speech incentives are valid alternatives under Supreme Court precedent. *See Ashcroft v. ACLU*, 542 U.S. at 669 ("Congress undoubtedly may act to encourage the use of filters.").

Another alternative would be to expand supportive public housing options. The research in the legislative file strongly indicates that those reentering society after incarceration are most likely to succeed if they have supportive housing programs that provide social services and subsidies. *See* SR 511-14, 524. The City here has taken the opposite tack—it allows the public housing authority to continue screening for criminal history while thrusting the risks of renting to former offenders upon the private housing market. This is not the least restrictive approach.

The City could also have opted a for less-restrictive background check regulation. The Ordinance could have, for instance, allowed a limited look-back period. Indeed, one earlier form of the bill did allow criminal history checks for convictions with a disposition date within the last two years. SR 242. Likewise, the City could have forbade use of only arrest records as grounds for denying tenancy or allowed criminal history checks for serious offenses. This is the approach taken by Oregon's fair housing law, which a study in the City's Clerk's File describes as an "optimal" example of balancing the interests of tenants and landlords. *See* SR 459. Under the Oregon law, a landlord cannot deny tenancy based on an arrest record but "may consider criminal conviction or charging history" for drug offenses, crimes against a person, sex offenses, fraud, or "[a]ny other

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crime if the conduct for which the applicant was convicted or charged is of a nature that would adversely affect" the landlord's property or the "health, safety or right to peaceful enjoyment of the premises of residents" or the landlord. ORS § 90.303(2)-(3). The City could have tried this "optimal" solution as described in its own legislative record.

The law could have also expanded exceptions. As it stands now, landlords can opt out of the gag rule for rental units that are part of a landlord's or a subleasing tenant's single-family residence or where a detached or accessory dwelling unit sits on the same lot as the landlord's primary residence. SMC § 14.09.115(C), (D). But other similar scenarios raise similar safety concerns—such as the Yims' situation, where the landlord and the landlord's children live in the same triplex, or units with roommates who all lease from the landlord rather than subleasing from a single tenant. Indeed, it is arbitrary to allow subleasing tenants to check criminal background but not allow an exception for roommates who all lease directly from the landlord. Kelly Lyles's tenant, who subleases to a roommate, could check an applicant's criminal history, but neither the Yims nor the Yims' tenants can check the criminal history of roommate applicants because the roommates lease directly from the Yims. This distinction is senseless. Additionally, other reasonable exceptions exist, such as an exception when leasing units that share a wall with a unit that houses children.

The suggestions above all involve new legislation, but existing law also provides a less-restrictive alternative to the gag rule. Under HUD guidelines, federal fair housing law forbids landlords from imposing a blanket policy of rejecting anyone with a criminal history. *See* HUD, Office of General Counsel Guidance on Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions 7 (2016).[3] Instead, landlords should perform an individualized assessment of each applicant with a criminal history and consider mitigating factors such as the circumstances surrounding the criminal conduct, how old the applicant was at the time, and evidence of rehabilitation. *Id.* This policy

[3] *Available at* https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF.

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preserves landlord's right to vet candidates while improving the housing prospects of individuals with a criminal history.

There are countless ways that the gag rule could have helped those with a criminal history to find housing without so expansively restricting access to criminal records. The City has not presented any evidence that such less-restrictive alternatives cannot satisfy the City's interests; it has therefore failed to demonstrate that the gag rule is narrowly tailored. *See Ashcroft v. ACLU*, 542 U.S. at 665.

II. The gag rule violates due process of law

The gag rule also deprives landlords of property without due process of law under both the state and federal due process guarantees. The Washington State Constitution uses an "unduly oppressive" test to assess due process claims in the property context, while the federal test requires that a law regulating use of property "substantially advance" the government interest. *Compare Presbytery of Seattle v. King County*, 114 Wn.2d 320, 330 (1990) *with Village of Euclid, Ohio v. Ambler Realty, Co.*, 272 U.S. 365, 395 (1926). By denying landlords the right to even consider an applicant's criminal history when choosing a tent, the gag rule fails both tests.

A. The gag rule is unduly oppressive

Selecting a tenant is a fundamental attribute of property ownership. *See Manufactured Housing*, 142 Wn.2d at 363-65 (landowners' right to choose the person they sell property to is a "fundamental attribute of property ownership"); *Yim v. City of Seattle*, Case No. 17-2-05595-6 (King Cty. Super. Ct. 2018), Order on Cross Motions for Summary Judgment at 4 ("Choosing a tenant is a fundamental attribute of property ownership."). A King County trial court recently recognized this right in striking down Seattle's first-in-time rule, which mandated that landlords rent to the first qualified rental applicant. *See Yim*, Case No. 17-2-05595-6. When government restricts a landlord's right to select who will live on their property, that restriction deprives the landlord of a fundamental property interest. *See id.*

Under the Washington Constitution's due process test for property deprivations, courts ask whether the challenged regulation is "unduly oppressive." *Presbytery*, 114 Wn.2d at 330.

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Washington courts have devised a factor-based test for this prong of the state due-process analysis, with non-exclusive factors that divide into public and private considerations. On the public's side, courts consider: the seriousness of the public problem, the extent of the landowner's contribution to the problem, the degree to which the chosen means solve the problem, and the feasibility of alternatives. *Presbytery*, 114 Wn.2d at 331. On the landowner's side, courts consider: the extent of the harm caused, the extent of remaining uses, the temporary or permanent nature of the law, the extent to which the landowner should have anticipated the law, and the feasibility of changing uses. *Id.*

The plaintiff landlords have a valid property interest in selecting their tenants. By denying them the ability to turn away an applicant because of a recent or dangerous criminal past, the City has deprived them of a property interest. The gag rule must therefore satisfy the requirements of due process, and this Court should assess the gag rule based on the public and private factors under the unduly oppressive test.

As for the public factors, the plaintiff landlords do not question the problems of recidivism and housing stability for the formerly incarcerated. Landlords, however, are not major contributors to these problems. Rather, recidivism and housing stability reflect far broader societal issues such as the criminal justice system generally and the strength of support networks for individuals reentering society after incarceration. This circumstance calls to mind the Supreme Court's warning in a similar context that government should not force "some people alone to bear public burdens, which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The next factor, the extent to which the City's chosen means solve the problem, also cuts against the City. For one, the City has not presented any evidence that Seattle landlords tend to reject rental applicants solely on the basis of their criminal history—indeed, the plaintiff landlords have expressed a willingness to rent to such individuals. *See* SF ¶¶ 1-8. Moreover, as discussed above, the gag rule suffers from significant underinclusiveness; the City cannot seriously address these problems until it offers easier access to the housing that is most likely to help those with

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criminal histories. The feasibility of alternatives is likewise a point against the City, given the many alternatives discussed above such as certification, tort reform, or insurance.

The unduly oppressive test next considers private factors: harm, remaining uses, permanency, expectations, and flexibility of use. *Presbytery*, 114 Wn.2d at 331. The harm here is significant because renting to individuals with a hidden criminal history presents risks to landlords and neighboring tenants. These include risks to personal safety and property, the risks of possible landlord liability for a tenant's crimes, and risks of a breached lease for nonpayment.

While recidivism rates taper off over time, more than two thirds of prison releasees re-offend or violate parole within three years of release, SR 527, and a sobering 83 percent of released state prisoners are arrested within nine years of release. Mariel Alper, *et al.*, Bureau of Justice Statistics, 2018 Update on Prisoner Recidivism 1 (2018).[4] The high chance of another criminal offense imposes risks on the landlord and neighboring tenants, including a considerable risk that a landlord will lose a tenant suddenly due to incarceration.

Federal law already recognizes the risks posed by individuals with a criminal history. HUD, for instance, mandates criminal background checks and denial for certain offenses, and it otherwise suggests that landlords check for and consider other criminal offenses. *See* 24 C.F.R. §§ 960.203(c), 982.553. The federal government's careful guard that it places on its federally assisted housing programs across the country underscores the reality that criminal history presents a serious risk that landlords are entitled to consider.

The City's recitals claim that there is no relationship between criminal history and an unsuccessful tenancy. *See* SR 589. This misrepresents the actual research that the City relies upon. The research in the legislative file only studied residents living in supportive housing programs—who tend to be generally at risk of chronic homelessness—and concluded that supportive housing residents with criminal histories on the whole were just as likely to have successful tenancies as other supportive housing residents. SR 511-12. In other words, the research says nothing about how someone with a criminal history fares in comparison to the average tenant in private

[4] *Available at* https://www.bjs.gov/content/pub/pdf/18upr9yfup0514.pdf.

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residential housing. Indeed, the research itself warned against applying this data to the broader housing market. *See id.* 511 n.116. This limited research does not vanquish the common-sense reality that individuals with a high risk of committing a crime pose a risk that landlords should be able to weigh, just like credit history or eviction history.

The remaining factors of permanency and anticipation of the Ordinance clearly favor the Plaintiff landlords. On the other hand, the factors of remaining uses and feasibility of changed use are not particularly relevant where a particular use of property is burdened rather than taken away entirely. On balance, the unduly oppressive factors weigh heavily against the gag rule.

B. The gag rule fails to substantially advance a legitimate government interest

The federal test for due-process violations in the property context is the "substantially advances" test. To satisfy due process, a property regulation must be "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety morals, or general welfare." *Village of Euclid*, 272 U.S. at 395; *see also Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540-41 (2005) (holding that the "substantially advances" formula applies to due-process property cases).

The City's decision to exempt the Seattle Housing Authority and other federally assisted housing from the gag rule underscores the arbitrary nature of the Ordinance. The City's own research indicates that people with a criminal history do best in supportive public housing programs like those provided by the Seattle Housing Authority. *See* Seattle Housing Authority, Supportive Services ("Seattle Housing Authority provides more than housing. Tenants have access to services that can help them improve their economic situation, pursue an education and obtain social services."). Yet the Ordinance seeks to deny the private market the right to make informed choices about tenancy on the basis of criminal records, while retaining that right for the category of housing most likely to help with recidivism and housing stability. This arbitrary approach to governance does not survive the "substantially advances" test.

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CONCLUSION

The Fair Chance Housing Ordinance blinds landlords to risks that they have a right to consider when making an important business decision. By restricting their access to public criminal history records and hobbling landlords' ability to wisely manage their properties, the City's gag rule violates free speech and due process.

DATED: Sept. 28, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on Sept. 28, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification to all counsel of record.

Dated: Sept. 28, 2018.

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